

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO.3925 OF 2005

IN

SUIT NO.4976 OF 2000

...

Mr.V.R.Maheshwari ...Plaintiff

v/s.

Mr.K.G.Rao, The Chairman

M/s.Maha Containers Pvt.Ltd.

and others. ...Defendants

...

None for the Plaintiff.

Mr.S.C.Naidu i/b Mr.B.V.Phadnis for Defendant No.2
in support.

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CORAM: D.K.DESHMUKH, J.

DATED: 29TH JUNE, 2007

P.C. :

1. This Notice of Motion is taken out by the Defendant No.2 for setting aside the order dated 27th August, 2001.

2. The Plaintiff had filed a summary suit against the Defendant No.3-company and Defendants Nos. 1 & 2 are joined as Director of the Defendant No.3-company. The court in paragraph 3 of the order dated 27th August, 2001 notes that the Plaintiff has filed an affidavit of service showing that the service has been effected on Defendant No.2. But the Defendant No.2 has not appeared despite effecting service and therefore, the court has passed a decree against the Defendant No.2. The learned Counsel appearing for the Defendant No.2 informs that there is only one affidavit of service on record in relation to Defendant No.2. That affidavit of service is dated 31st August 2001 filed by one Mr.Vishnu R. Maheshwari, which states that the summons for judgment No.766 of 2001 was served on Defendant No.2.

3. The learned Counsel for the Defendant No.2 informs that there is no affidavit on record saying that the writ of summons was served on the Defendant No.2 and the Defendant No.2 has not appeared. The order is on the footing that the writ of summons was served on the Defendant No.2 and he has not appeared. Whereas, perusal of the affidavit of service on the basis which that order is passed shows that what was served on the Defendant No.2 was the summons for judgment, which implies that writ of summons was served on the Defendant No.2. Without serving writ of summons on the Defendant, summons of judgment cannot be taken out. To say the least, it appears that, in so far as the aspect of service of writ of summons on Defendant No.2 is concerned, there is utter confusion on record. Therefore, in my opinion, it will not be in the interest of justice to allow the exparte decree passed against the Defendant No.2 to stand. Notice of Motion is, therefore, granted in terms of prayer clause (a). Motion disposed of.

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